UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. W. CARL REICHEL, Defendant.	Criminal No. 15-CR-10324-DPW

DEFENDANT'S MEMORANDUM IN SUPPORT OF REQUEST
FOR INSTRUCTION THAT RELATIONSHIP BUILDING IS NOT UNLAWFUL

Defendant Carl Reichel submits this memorandum in support of his request that the Court instruct the jury that remuneration offered for the mere purpose of building a relationship or to build goodwill with a doctor is not prohibited by the Anti-Kickback Statute. *See* Def.'s Proposed Instructions (ECF No. 149), Instruction No. 28 at 34-35.[1]

There is ample evidence in the record that representatives were directed to develop relationships with physicians as an initial step in the sales process. The evidence suggests a widespread belief that relationships were important to gain access to physicians to sell the clinical benefits of the drug and to have frank conversations with the doctors that might ultimately make it more likely the doctors would prescribe Warner Chilcott drugs. They were thus used for to create opportunities to persuade, not as bribes. For example, Mr. Eckles testified that "the reason to build the relationship" is so that the representative appear more credible when clinically selling the drug, and the doctor has to "agree that the product is better" for his patients before he will write it. 6/2/16 Tr. 6:20-7:3. One of Mr. Eckles's own representatives remarked that she was able to "build a great relationship with" a previously hard-to-see doctor through dinners and was then allowed to speak with the doctor in his office. Ex. 55. Ms. Galvis likewise testified that relationship building was about getting access to doctors in order "to convince them that the drug was better for their patients" and "figure out why they weren't writing if that was the case." 5/24/16 Tr. 154:2-7, 19-25. And Mr. Pappas testified that "[a] lot of times" representatives would ask permission to see doctors during the day who were otherwise unavailable based on their relationship ("now that [they knew] each other"). 5/25/16 Tr. 27:5-12.

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[1] This request is consistent with this Court's prior instruction in *United States v. MacKenzie*—another alleged conspiracy to bribe doctors under the Anti-Kickback Statute: "It's not the purpose or within the scope of the Anti-Kickback Statute to prohibit transactions that reflect the mere hope or expectation or belief the drug purchases might ultimately ensue from the business relationship. Likewise, simply providing a customer with an opportunity to profit from a large number of purchases does not in and of itself constitute an inducement. And mere oral encouragement to convince someone to purchase a drug does not itself violate the law. Rather, the statutory requirement of improper inducement is satisfied only if remuneration, as I have defined it, is offered or paid as a quid pro quo for the specific purchase of the drug. Cultivating a business relationship is not improper. A person does not violate the Anti-Kickback Statute by providing things of value solely as part of a routine cultivation of a business relationship rather than with the intent to induce specific purchases. " *United States v. MacKenzie*, 1:01-cr-10350-DPW, Transcript of Charge to the Jury, July 9, 2004, at 54:11-55:2.

The Court should allow defendant's request for three reasons:

First, the Anti-Kickback Statute was not meant to prohibit sales representatives from developing relationships in order to sell their product. This is implicit in *Bay State*, which approved of the "primary purpose" requirement was consistent with congressional intent and rejected a vagueness challenge to the Statute because of its "unusually high scienter requirement"—requiring both a knowing and willful violation *and* that the "purpose of the payments [was] primarily for inducement." *See Bay State Ambulance & Hosp. Rental, Inc.*, 874 F.2d 20, 30, 33 (1st Cir. 1989). *See also United States v. LaHue*, 261 F.3d 993, 1008 (10th Cir. 2001) (rejecting vagueness challenge where the jury instruction interpreting the Act "clearly allow[ed] business relationships . . . where the motivation to enter into the relationship is for legal reasons entirely distinct from the collateral hope for or decision to make referrals").

Second, the requested instruction—given in *MacKenzie*—adopted language used by numerous other courts interpreting the Anti-Kickback Statute. In *United States v. McClatchey*, the Tenth Circuit approved the trial judge's instruction that defendants "cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law." 217 F.3d 823, 834 (10th Cir. 2000). Many other courts have approved of this language since.[2]

Third, case law in analogous areas supports the idea that building a relationship to get access to persuade is widely acceptable conduct and not criminal. As the Court is aware, the Supreme Court has concluded that a person does not bribe a public official—another profession whose judgment Congress has decided to protect—by offering a gift to "build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts." *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405 (1999). Courts instructing on this requirement have required the government to prove more than that a payment was offered "only to cultivate a business or political relationship." *See, e.g., United States v. McDonough*, 727 F.3d 143, 157 (1st Cir. 2013) (discussing jury instruction). Setting aside the authority concluding that the bribery statute and Anti-Kickback Statute should be interpreted similarly and applied in other areas, *see* Def.'s Response Submission (ECF No. 236) at 3 n.4, the bribery cases are most analogous here because the Government proceeds on a similar quid pro quo theory—

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[2] *Accord United States v. LaHue*, 261 F.3d 993, 1007 (10th Cir. 2001); *U.S. ex rel. Williams v. Health Mgmt. Associates, Inc.*, No. 3:09-CV-130 CDL, 2014 WL 2866250, at *11 (M.D. Ga. June 24, 2014); *United States v. Rogan*, 459 F. Supp. 2d 692, 714 (N.D. Ill. 2006), *aff'd*, 517 F.3d 449 (7th Cir. 2008).

dinners and other remuneration were offered to bribe physicians to prescribe, much like an official act.

CONCLUSION

For the foregoing reasons Mr. Reichel respectfully requests that the Court instruct the jury that building a relationship with a doctor for the purpose of gaining access to sell the benefits of a drug is not prohibited by the Anti-Kickback Statute.

Respectfully submitted,

CARL REICHEL

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF), on this 14th day of June, 2016.

/s/ Joseph F. Savage Jr.
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